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Are there Asian diasporic laws in Britain?

Reconsidering the presuppositions of legal pluralism

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"The recovery of previously marginalised spheres is welcome; it is the mode of recognition that is problematic - their recovery within the discourse of law." (Roberts 1998: 98)

Abstract

The concept of 'Asian laws in Britain' was proposed in the 1990s by a leading scholar of South Asian laws, Werner Menski, within the larger framework of legal pluralism. This article explores the reasons why it might be an attractive description and the possible reasons for its shortcomings, as well as a brief assessment of its take up more widely among scholars, officials, the communities to which it refers and others. The article examines the viability of this conception of Asian laws in the British diasporic sphere by entering the broader debate between the proponents of legal pluralism and their naysayers, identifying the main lines of dispute and its productive results as well as their limits in helping to make progress towards a theory of law. The mutual accusations of ethnocentrism, Eurocentrism or parochialism among the debate's protagonists are discussed in order to identify how legal pluralists may be open to the charges they level against their opponents. The discussion is given more concrete form by drawing attention to the arguable non-universality of the domain of the normative upon which legal theorists and legal pluralists generally rely for their conception of law. If the domain of the normative is not universal, law itself cannot be universal as the legal pluralists claim. Although Muslim/Islamic law appears to have gained a large number of adherents among the reconstructed components of Asian laws in Britain, the discussion shows how another component - Hindu law - cannot be 'law' in the manner its proponents claim. The consequences for the viability of a conception of diasporic Asian laws in Britain are then drawn out.

Keywords: Asian laws in Britain, legal pluralism, minority legal orders, Islamic law, Hindu law, *angrezi shariat*, *angrezi dharma*

1. Introduction

Adherence to legal pluralism extends to a growing chorus of social scientists, many of whom value its potential to ameliorate state-centrism in legal discourse. Legal pluralism has been found to be a useful way of capturing the social reality of post-colonial societies beyond the state-law nexus, and it is increasingly considered relevant with respect to immigrant and diaspora groups in Western countries. Legal pluralism has not been without its discontents, however. Among the well-known proponents of legal pluralism, Werner Menski and the late Franz von Benda-Beckmann, have confronted the emerging criticism of legal pluralist thought, expressed most prominently by Simon Roberts and Brian Z. Tamanaha. The ensuing exchanges exposed fundamental differences with respect to 'strong' or

'new' legal pluralism, with a central concern being the claim of legal pluralists to extend the property of law to all societies and cultures. Both sides have claimed that the other is implicated in ethnocentrism, Eurocentrism or parochialism. Despite their differences, both sides also share in common the assumption that law has something to do with the normative domain.

In light of the debate between the legal pluralists and their opponents, this article examines Menski's hypothesis about the emergence of Asian laws in Britain as advanced within the framework of legal pluralism. From the 1980s, Menski had proposed that South Asians were redeploying their cultural resources to reconstruct their laws in the British diaspora. In so doing, Menski was a pioneer in considering the application of the legal pluralist framework to such diaspora groups in Western countries. This article proposes that the problems identified with the claims of legal pluralists by their opponents also get imported into the conception of Asian laws in Britain, which appears euphemistic at best or entails a category mistake. Conversely, the claim to an Islamic law in the Western diaspora makes eminent sense and the answer to the question why may provide a useful route to developing a future theory of law.

The first section of this article introduces the concept of Asian laws in Britain, the reasons why it might be an attractive description and the possible reasons for its shortcomings, as well as a brief assessment of its take up more widely among scholars, officials, the communities to which it refers and others. The second section goes into the discussions between the proponents of legal pluralism and their naysayers, tries to identify the main lines of dispute and the productive results of the discussions, as well as their limits in helping to make progress towards a theory of law. In the third section, the mutual accusations of ethnocentrism, Eurocentrism or parochialism among the debate's protagonists are discussed in an effort to identify how legal pluralists may be open to the charges they level against their opponents. The discussion is given more concrete form by drawing attention to the arguable non-universality of the domain of the normative upon which all legal theorists and legal pluralists rely for their conception of law. If the domain of the normative is not universal, law itself cannot be universal as the legal pluralists claim. The third section ends with a brief discussion showing how Hindu law, among the components of Asian laws in Britain, cannot be 'law' in the manner its proponents claim. The conclusion sums up the consequences for the viability of a conception of Asian laws in Britain.

2. Asian laws in Britain?

In Britain, 'Asians' effectively meant, and still means, what contemporary academia, inspired by post-war American usage, refers to as 'South Asians'. Since it does not encompass migrant-descended groups from other parts of Asia, it looks increasingly ill fitting. Even its limited application to South Asians appears questionable, and is sometimes questioned, especially when it is used to disguise Muslim transgressions of societal mores. But the practice is now ingrained and appears difficult to dislodge; it is an established part of administrative, political, journalistic and academic speech as illustrated by the term 'Black, Asian and Minority Ethnic' (BAME), which is in wide public use.

Werner Menski was the first to claim that the framework of legal pluralism could be used to describe the transplantation of customs resulting from the immigration of Asians into Britain. In a series of writings since the 1980s, he referred to legal pluralism in the Hindu marriage (Menski 1987) and Asian laws in Britain (Menski 1993). More recent work by Menski focused on Muslim law and legal pluralism

in Britain and elsewhere (Pearl and Menski 1998; Menski 2001).[1] Menski claimed that that there was an ongoing unofficial reconstruction of law predominantly by groups of South Asian origin settling in Britain. This unofficial reconstruction was juxtaposed to the official law whose operations remained largely indifferent to processes of legal reconstruction among these groups. Other contemporaneous work excavating the same ground, especially by Sebastian Poulter, maintained the official classification of the phenomena and Menski criticised the dominant state-law framework exemplified in Poulter's writings (also Menski 2006a: 58-65).

The framework of legal pluralism was found attractive by this author (Shah 2005, 2008) who became a student of, taught alongside, and worked in collaboration with Menski. As Tamanaha (1993: 205) observed, the descriptor 'law' brings some importance and symbolic prestige in contrast to mere rules or norms. Legal pluralism thus seemed empowering and avoided the de-statusing of South Asian and other ethnic minority cultures implied in the rejection of official legal status. This rejection is standard within Western jurisdictions in contrast to the situation in other countries, not merely in South Asia, where legal systems provide official status to social customs and religious rules, which are sometimes designated as 'personal laws'. Furthermore, in the diasporic context it seemed odd that the attribute of being 'legal', taken for granted during the pre-migration stage, would cease upon arrival in the West. Only a limited exception was provided by private international law (conflicts of law) which played the role of primary container for legal questions concerning these South Asian and other diasporas (Menski 2006a; Menski 2008: 48, 54). Adopting legal pluralism helped circumvent the undeclared embargo on research that previously ignored the situation of such diasporas except to the extent that they collided with official law (Menski 2006a: 21). A number of reasons therefore made compelling the descriptors 'law' and 'legal', as well as the framework of legal pluralism.

In the same period, when this way of describing the situation of South Asian diasporas was being pioneered by Menski, he was developing his theoretical framework of legal pluralism in the context of comparative law globally (notably Menski 2006b). Establishing himself in the camp of scholars of 'strong legal pluralism' (Griffiths 1986) or 'new legal pluralism' (Merry 1988; Tamanaha 2001: 115-117), he joined those who rejected 'weak legal pluralism' (Griffiths 1986) or 'classic legal pluralism' (Merry 1988) as an account of recognition by state or official law, and adopted a broader description that transgressed the divide between official and unofficial fields. While it promised an immunisation from the vagaries of official recognition, it had more than merely theoretical consequences. As Menski (2006b: 61) noted: "It is too simple for lawyers to insist that multi-ethnic hybrids are not legal phenomena and may be ignored. But how far should this pluralisation and its legal recognition go? Starting a discussion implies and begins the process of more formal recognition." Even in those non-Western jurisdictions where official recognition of personal laws was entrenched, one could maintain a wider conspectus that enabled seeing and describing a variety of other domains as belonging to or impinging upon the legal sphere (e.g. Menski 2003). Consistent with De Sousa Santos (see Merry 1988: 887-888), Menski (2003: 545-598) too saw legal pluralism as playing a key role in the postmodern conception of law.

For a number of reasons, however, the legal pluralist enterprise has been coming under strain and seems less capable of offering a coherent approach to thinking about the situation of complexity within legal systems which experience cultural diversity as a consequence of mass migration. This is more obviously the case in situations where 'weak legal pluralism' or 'classic legal pluralism' of the personal law kind did not hold. After all, private international law isn't compelled to engage with

[1] Menski (2008: 43-53) recounts this pioneering movement himself and elsewhere (Menski 2000) places it within the larger context of the study of South Asian laws.

personal law in the case of migrants coming from jurisdictions with legal structures dissimilar to those South Asian countries from which the bulk of post-war immigrants to Britain came. In the former case, legal professionals or those academics consulted by courts and tribunals for expertise on foreign laws or ethnic minority customs don't need to refer to personal laws. Although it was the latter set of South Asian countries, especially India, which Menski (2006a) thought might hold lessons for handling problems of diversity in a Western-style legal system such as Britain's, it isn't clear that such lessons could be made available to address a broader set of diasporas. Furthermore, for Western countries, the larger South Asian countries have exemplified intolerance. While this is true of the ever-unfinished projects of Islamisation in Pakistan and Bangladesh, sustained propaganda in the West, not least from the sprawl of national and multilateral religious freedom bodies and a consensus among academics, ensures that India is considered little better. The latter's anticipated push for a uniform civil code is no doubt going to be read as an anti-minority move.

The limits to 'strong' or 'new' legal pluralism as a theoretical framework are intuitively picked out in the case of the mass immigration to the UK that accompanied the expansion of the EU in 2004. There, Kubal (2012: 38-46) considered but dismissed its usefulness in favour of the models that refer to 'legal culture' or 'legal consciousness'. Without referring to Menski's work, in her report written for the British Academy, *Minority Legal Orders*, Maleiha Malik (2012) adopts a typology distinguishing between 'minority legal orders', on the one hand, and merely 'normative social regulation' not amounting to being 'legal', on the other. She does that on the ground that the former have the means of institutional norm enforcement whereas the latter don't. She observed the presence of Jewish, Christian and Muslim minority legal orders in Britain. She noted, however, that "Further research is necessary to establish whether other minority communities, such as Hindus, Sikhs and the Roma, have normative social regulation that is sufficiently institutionalised to be classified as a minority legal order" (Malik 2012: 50). Although Menski had foreseen that the framework of Asian laws would apply in the case of South Asian Hindus, Sikhs, and Muslims (and Jains, Parsis and Christians) in the UK, as Malik's report illustrates, it hasn't actually been taken up to any significant extent for all these groups. British courts have occasionally made references to "the religious laws and practices of the Sikh faith" (*Pawandeep Singh v. ECO, New Delhi* [2004] EWCA Civ 1075, para. 2; Shah 2009: 118). However, other than for Muslims, describing the situation of the South Asian diaspora in terms of legal pluralism hasn't caught on among academics or among non-Muslim South Asians themselves. Neither has immigration from other parts of Asia, other than by Muslims, been taken to entail some process of 'legal' reconstruction in the diaspora.

Predictably, however, for describing the situation of Muslims (and not just South Asian Muslims), legal pluralism has found much greater appeal (e.g. Pearl and Menski 1998, 2001; Yilmaz 2005). Menski developed a term for it, *angrezi shariat*, which was recognised by the leading human rights lawyer and member of the House of Lords, Lord Lester (Grillo 2015: 105). The famous speech of February 2008 by the then Archbishop of Canterbury, Rowan Williams, on the application of religious law in England attracted wide coverage and some controversy at the time. In the Q&A that followed the speech, Dr Williams gave a quite telling reply to one question which is worth quoting here:

> "Q: Why are we not asking similar questions of non-Abrahamic faiths, such as the increasingly marginalised Hindu society?"
>
> "Dr. Williams: I think there are many, many people of Hindu affiliation in this country who see themselves, understandably, as having been rather "ruled out" by the great focus, the great concentration on issues around Islam. And I don't think that's healthy. I think that there are many issues about how we relate to Hindu minorities here which need addressing. The difference of course is that you are not there dealing with, obviously not a single body, but a

> tradition, a shared practice of jurisprudence, in the way that you are where Islam is concerned."

Legal pluralists would most likely disagree with the former Archbishop, as might the Indologist experts on Hindu law. However, in the partial appeal of the framework of legal pluralism and the idea that some groups, not others, undertake a process of *legal* reconstruction lie important clues about the potential direction in which a future discussion about the nature of law could take. To discover that we need to take the long road through the controversy accompanying the idea of legal pluralism.

3. Legal pluralism and its critics

Some four decades ago, when legal pluralism was not as fashionable as it has since become, Simon Roberts (1979: 204) posed the question:

> "What do we gain by insisting that particular arrangements should be characterized as 'legal', whereas others should not? It remains unclear how the use of this label can help us in the essential task of understanding what particular institutions look like, how particular processes work, and the ways in which these are to be distinguished analytically from those found in other contexts."

The problem Roberts raises is central to the legal pluralist enterprise although it hasn't received a clear enough answer. Although Roberts (1979, 1998) was an early dissenter in legal anthropology, it was Tamanaha who emerged as a chief critic of legal pluralism since the 1990s. He characterised it as a "precociously successful doctrine" and one that had become one of the dominant concepts in the field of legal anthropology (Tamanaha 1993: 192; also Roberts 1998: 96; Menski 2006b: 90n on its dominance in the anthropology of law). Tamanaha (1993: 203-204, also Tamanaha 2011: 116) points to the disciplinary orientation of anthropological fieldwork which, although done initially on non-Western post-colonial societies, inevitably became "aimed at home" i.e. once the practitioners became engaged in Western university faculties. Benda-Beckmann (2008) seemed to make similar suggestions about the difference between legal anthropologists, who would work mainly in the field in non-Western societies and tended to gravitate towards legal pluralism, and legal sociologists who did so less, and worked in tandem with the presupposition of law as state-law, the dominance of which became the chief target of the legal pluralists. Benda-Beckmann (who may have pioneered the term legal pluralism, *Rechtspluralismus*) is cited by Tamanaha (1993: 197) as having somewhat pejoratively said that "many legal sociologists submitted to, and inevitably romanticized the dominant legal system". The most prominent of Asian legal pluralist scholars, Chiba (1998: 229-230), noticed the tendency among his Western legal sociologist colleagues to use the terminology of 'legal culture' and a correlative reluctance to use legal pluralism for the description of Western jurisdictions. This echoes the choice made by Kubal (2012) for her study of Polish immigrants in the UK. Despite such misgivings, Tamanaha (2001: 171) was able to report that some of the world's leading socio-legal scholars had announced their allegiance to the concept of legal pluralism and plaudits regarding its potential kept accumulating. Tamanaha (2001: 175) suggested an even broader influence, citing an expanding list of social scientists and social theorists who rejected legal centralism and adopted legal pluralism, although he warned that this enthusiastic embrace of the current approach was premature.

Whether legal anthropologists or otherwise, legal pluralists have viewed their main mission as being to correct modernity's association of law with state-law only, the 'state-law link' or 'state-law nexus' as Benda-Beckmann (2002) described it. Summarising the positions held by Griffiths, Galanter, De Sousa Santos, Benda-Beckmann, and Sack, Tamanaha (1993: 194-195) characterised the legal

pluralists' challenge as "uncompromising". Tamanaha (1993: 197) encapsulated the reason behind the challenge: "the dominant (definitional) conception of the law sees the law as a product of the state. From an anthropological point of view, this linkage of law to the state is problematic. It implies that those societies without a state have no law." In trying to correct the vision of law as state-law, the legal pluralists had gone on to extend their conception of law as going beyond the state and incorporating within it all kinds of other normative phenomena. Tamanaha (2001: 173) called this the "core credo" of legal pluralists. In place of the dominant adherence to the state-law link, the legal pluralist conviction is that "No society is without law" (Moore 1978: 215; Tamanaha 2001: 178). Rodolfo Sacco (1995: 459, noted by Roberts 2005: 6) provides the Italian reflection of this credo: "Wherever we find a society, we will find law."

Tamanaha (1993; 2001: 173-181) identified two problems with this enterprise. First, it leaves us without the ability to distinguish mere norms and the normative from law, leading to the question why we are interested in law as a distinct field at all and why (some) norms should be dressed up as legal and others not. Second, the conception of law that legal pluralists used, based on some functional idea of institutionalised norm formulation or enforcement (of the kind that Malik 2012 and Sandberg 2016 still appear to find useful), was determined by extracting or emulating those elements essential to state law, and then subtracting all trappings of the state. Mainly for these reasons, Tamanaha concluded that, as with legal theorists, legal pluralists too had not had success in identifying law and should abandon their search since it presupposed an essentialist concept that was bound to elude them.

Tamanaha (2001: 193-194) plumped for a "conventionalist" approach to law. He argued that law is a thoroughly cultural construct because of which no particular concept or definition can capture it, and this explains why the search for a concept or definition has eluded both legal theorists and legal pluralists. The variety of phenomena that the label law is attached to indicates that law is what we attach the label to. Tamanaha does not reject legal pluralism. He "clearly acknowledges the existence of legal pluralism" (Menski 2003: 587), but rejects the presupposition that all societies have law. As Tamanaha (2001: 194) says, "A state of 'legal pluralism' exists whenever more than one kind of 'law' is recognised through the social practices of a group in a given social arena which is a relatively common situation." Far from being a rejectionist, Tamanaha provides a different, conventionalist basis to law and legal pluralism. What he rejects is a presupposed basis of law and legal pluralism in a claimed singular set of necessary criteria, which have not yet been discovered. He can therefore consistently say that a multiplicity of types of law exists and that we may speak of legal pluralism when they exist in the same social arena. This has some interesting consequences. State officials, especially in non-Western countries, might refer to religious or customary laws as laws recognised within the official field as part of their particular sort of social practice and we are encouraged by Tamanaha to treat this practice as 'law' because they do. However, a group of anthropologists or legal theorists whose social practice within university faculties, conferences, journals, etc. treats a body of norms and practices as 'law' may not bring to life a form of law although it "may later qualify as such if this understanding is related back to the social arena and is conventionally taken up (which has in fact occurred)" (Tamanaha 2001: 226). At the same time, one of the consequences of Tamanaha's conventionalist approach is that if no group within a society refers to 'law', then there is no law in that society (Tamanaha 2001: 201).

Tamanaha's approach has attracted criticism, sometimes based on a caricatured image of what he actually advocated. Evidently spurred on by Tamanaha's advocacy of "socio-legal positivism", Menski (2003: 588) says that Tamanaha presents "a repackaged form of positivism". He criticises Tamanaha on the ground that he "does not succeed in presenting a credible universal theory" (Menski 2003:

586n). If by that is meant that his account had to presuppose the presence of law in every society that is hardly what Tamanaha set out to do. Rather, the test of Tamanaha's success has to be the degree to which he introduces scepticism regarding legal pluralist claims about the universality of law. Menski went on to chide Tamanaha for sarcastically suggesting that "the comparativist has to accept everything that is not legal as legal", for mockingly describing the declaration of "all non-law to be equal to law as an absurd folly", for circularly arguing that "law is simply law because someone said so", and for lacking a "constructive academic response to pluralist reality" by fussing over boundaries and messiness (Menski 2006b: 66, 98, 186, 600). Woodman (1998: 41) thought Tamanaha (1993) was arguing that "the concept of law should be reserved for state law". However, even if his earlier article was ambiguous on that point, he later made clear that his conventional approach did not exclude seeing non-state law as law as long as it was so recognised in the social practices of a group (Tamanaha 2001). As discussed further below, the charge of ethnocentrism, etc. levelled at legal theorists by legal pluralists for their attachment to the state-law linkage is renewed against Roberts' and Tamanaha's claim that the legal pluralists' conception of law is no more than "a self-conscious privileging of the folk categories of Western law" (Roberts 1998: 97, also Roberts 1979: 203-204).

In his defence of the legal-pluralist position, Benda-Beckmann (2002: 42-44) argued that the task for anthropologists and comparative social scientists was to develop an analytic concept of law and legal pluralism useful for comparative purposes. He accepted that the focus on the state-law link was being overdone. Benda-Beckmann (2002: 48-49) saw law as a set of cognitive and normative conceptions that recognise and restrict the autonomy of a society's members to behave and construct their own conceptions, all legal phenomena, including the cognitive conceptions, being normative in this sense. In other words, they must be cognitive and normative at the same time. Cognitive conceptions state how things are and why they are what they are; normative conceptions state how things ought to be, must be or may be. Although both Benda-Beckmann and Tamanaha pull away from claiming that they are developing any sort of theory of law, Benda-Beckmann seems to envisage that an analytic concept of law as progressed by legal pluralists, combined with empirical studies, would result in the development of a better theory of law. These responses are arguably productive results of Tamanaha's (and Roberts') challenge, even if as discussed further below, they carry their own limits and they did not comply with Tamanaha's demand that a search for a transcultural conception of law be abandoned.

Despite the glimmer of some productive results, we have not been able to progress very far down the road of understanding the phenomenon of law better. Tamanaha's conventionalist definition would bring adat into the field of law because people within a given social arena refer to it as customary law or by its specific name adat by which they intend to refer to a form of law (Tamanaha 2001: 226). Tamanaha notes that often a label like 'customary law' will be will be used because that is what accords it status under the state law regimes which recognize customary law. It isn't clear from his account how the transition from custom to customary law is made. In the case of adat, is it because this status derives from colonial recognition of it as a form of law ("Such references are not unusual in former colonized countries.")? Or is it because adat gets recognised as a legal source by Islamic law and hence acquires legal status, at least for those for those Muslims who follow it? This leaves open the question of what non-Muslims should make of their adat. Is it required that adat should be a normative practice or would mere practice suffice? The adat illustration underscores the slippery nature of Tamanaha's characterisation which results not merely from his unwillingness to commit to the possibility of a theory but also his conviction that such a theory is not possible.

Arguably, Tamanaha's main contribution to this debate is his compelling case that the legal pluralists have unduly extended a conception of law to all societies. However, his alternative, conventional

approach is not helpful beyond a certain point. Although it helps highlight that law is a cultural product, it doesn't go further to explain why some cultures have needed law as an essential principle of order. His basically anti-theoretical approach is grounded in an argument that the sheer variety of phenomena to which the label law attaches itself necessarily entails abandoning the search for a theory of law. His conviction that the lack of an essential quality to law would inevitably elude legal theorists seems premature. It is arguable that such a theory has not been arrived at because of the self-imposed burdens or constraints by which its search has become encumbered. Although the legal pluralists have weaknesses in their approach they appear to leave open the possibility of a theory of law (Benda-Beckmann 2002: 74) or even demand a better one (Menski 2006b). But legal pluralists have fallen into theoretical laxity by proclaiming all kinds of phenomena as law and, as a matter of presupposition, attributing law universally to all societies. This requires not the abandonment of theory but greater rigour in how one arrives at that theory. A theory should account for law as a thoroughly cultural product but should not be misled into the route a conventionalist account takes us. Roberts (2005: 21) conveys a sense of this, saying "If we take Tamanaha seriously, we effectively turn our backs on an 'analytic' project altogether." A theory would need to account for why some cultures carry an intuition of the necessity of law as a precondition for the sense of order and why others don't. It need not endorse the universal claims of the legal pluralists and should countenance the lack of law in some societies or cultures. Such a theory would also entail that what is conventionally law in some contexts turns out not to be law under the constraints of the theory, while in other cases it does turn out to be law. It might also meet the recurring insistence, especially among writers trying to establish why religious laws are laws (Malik 2012; Sandberg 2016), that law requires some form of institutional norm enforcement, despite Tamanaha (1993; 2017) having already cut off this line of argument. It would address the unmanageable variety that concerns Tamanaha but would ask legal pluralists to renounce their core credo: "No society is without law…".

4. Ethnocentrism, Eurocentrism and parochialism

The dispute between the legal pluralists and the naysayers involved mutually-levelled charges of ethnocentrism, Eurocentrism or parochialism. Legal pluralists defend the extension of their conception of law to beyond the domain of the state by claiming that the state-law association betrays an ethnocentrism, Eurocentrism or parochialism by privileging the concept of law of only one culture and denying others their conceptions. Tamanaha (1993: 197) summarises:

> "Since law has for the past several centuries been seen by the West as the singular characteristic of a civilized society, the ethnocentric implication of this linkage is that pre-state societies were uncivilized. The second objective of legal pluralism … is to combat this ethno-centricity."

It hasn't always been the case that the attribute 'law' was denied by Europeans to fellow humans they considered primitive. Notions such as primitive law, ancient law, heathen law and tribal law were seen as usual attributes of non-Western societies. Such descriptions carried with them an evolutionary religious hierarchy and were put to use to envelop some indigenous laws within some colonial legal regimes (Benda-Beckmann 2002: 52). The mere attribution of the property law to non-Western societies was therefore not considered incompatible with treating them as evolutionarily inferior or in colonising them. To describe non-Western societies as having law did not and cannot therefore act as a prophylactic to their unequal treatment.

Contrary to advocates of legal pluralism, the more recent and dominant strain among legal theorists, sociologists, and even some anthropologists made the existence of 'law' or 'the legal' dependent on organised sanctioning (Benda-Beckmann 2002: 52-53). As Hart contemplates, these non-advanced societies without secondary rules are "pre-legal", which is seen as a "rather nasty" (Menski 2003: 586n) resurrection of the kind of evolutionism preferably consigned to the past (Menski 2006b: 98-103). This move is the main target of the accusation that there is an ethnocentrism, Eurocentrism or parochialism in denying the cultures of others the property of law, and supports the legal pluralists' claim to extend that property to all cultures. The accusation is not mitigated by the observation of Tamanaha (1993: 197) that non-Western countries now all share with Western societies in having law because they also have the, albeit imposed, systems of law as a result of Western expansion. More precisely, they have a state and so have law too. However, this would still leave the cultures of (some) non-Western societies as not being legal and would celebrate as the legal dimension of those societies something that was imposed or borrowed under the pressure of Western imperialism, colonialism or globalisation. Although Tamanaha's plea in mitigation is consistent with his own discussion of legal pluralism, one can see why it might not satisfy other legal pluralists. One might see then why Benda-Beckmann (2002: 58) accuses both Roberts and Tamanaha for wanting to retain an ethnocentric folk category, and why he castigates Tamanaha's conventionalist approach as amounting merely to a "multi-ethnocentric folk definition". The extension of law based only on the conventionalist standpoint that Tamanaha argues for would disappoint the legal pluralists who regard law as an *inherent* and therefore universal feature of all cultures: "No society is without law…." The legal pluralists' core credo holds not just horizontally in the present but for the past too; "legal pluralism is ancient", says Menski (2006b: 85, also 117).

The legal pluralists face another difficulty, however, in that their claim to extend law to all cultures can also be seen as a form of ethnocentrism, Eurocentrism or parochialism. That is, it attracts the very accusation that legal pluralists level against others but on the ground that the extension of law to all cultures universalises a parochial property of one or some cultures, "jamming" (Benda-Beckmann 2002: 54) them into Western categories. As Roberts (1998: 98) had said, "so much of our sense of what law 'is', is bound up with, and has been created through, law's association with a particular history - early on, the emergence of secular government in Europe; later, the management of colonial expansion". Naturally, the charge is disputed by the legal pluralists. Today they claim to have abandoned not only the hierarchical evolutionism of the past but also any strain of ethnocentrism that, admittedly, may have existed once. Benda-Beckmann (2002: 55), for instance, argues that, in incorporating an analytic concept of law, legal pluralists reject ethnocentric understandings entailed by translating certain characteristics of 'western laws' into their reading of normative orders in the non-Western world. He throws back the accusation of ethnocentrism at critics like Roberts and Tamanaha: "They impose their ethnocentric legal ideology on other peoples' normative orders and exclude anything from being 'legal' that does not conform to that ideology." Benda-Beckmann appears to overlook the fact the ethnocentrism isn't dissolved merely by extending law universally, especially if its conceptualisation is specific to some cultures or societies. Wouldn't comparative study benefit by looking deeper into the question whether some societies may not possess law *of any kind*?

Resistance to the suggestion that Western ethnocentrism or parochialism continues to characterise social science descriptions of non-Western societies seems grounded in little more than an article of faith, an auxiliary credo, as it were. It evidences faith that a distance from the conceptions picked up through socialisation in one's own society must somehow have been achieved at some point in one's career but doesn't prove it. Consider the following passages by Benda-Beckmann (2002: 54-55):

> "Yet it would also be naive to maintain that social scientists could not distance themselves from the meanings which have been developed in their own society, and that they would necessarily be forced to adopt (or keep running after) those definitions provided by powerful or hegemonic agents. Why should one argue like this at all? Why should one treat law so very differently from other categories we use for comparative purposes: religion, politics, marriage, and property? Why is it so impossible to take distance from the parochial understanding of law and develop it into a wider category useful for looking at differences and similarities between different historical manifestations of law?
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> …
>
> "Moreover, statements condemning the use of law and legal pluralism on these grounds are frequently apodictically and unsupported by an analysis of the work of scholars who allegedly, by using law, incorporate ethnocentric understandings into their writings. It is by no means that case that researchers during the past 30 years would usually have translated certain characteristics of 'western laws' - such as their ideologies of court decision making (rules determine outcomes), the functional differentiation of adjudication, the differentiation between law and politics - into their reading of normative orders in the non-western world. Proponents of a wider analytical concept of law explicitly formulate the properties of the concept in a way that does not include ethnocentric British, Minangkabau or Barotse elements into the definition of law but sees them as variations."

Although posed in terms of epistemological problems, the questions are rhetorical in nature. The context suggests that proposing anything other than that the necessary distance has been acquired to avoid parochialism would be a fool's errand ("it would also be naïve"). However, the conviction in the human sciences regarding religion's universality depends on Christian theological claims (Balagangadhara 1994) and, therefore, a form of Western parochialism. The conviction about the necessity of secularism as the solution to religious conflict (De Roover 2015) and about the Indian caste system (Farek et al 2018) is founded on Protestant claims about Indian religion. If these are instances of ethnocentrism or parochialism, they appear to be endemic to the social sciences (Balagangadhara 2012), and not only preceded Benda-Beckmann's defence of legal pluralism but have continued thereafter.

Examples may be demanded, though, whether legal pluralists have abandoned their parochialism. One example is furnished by the universal consensus that law is something to do with the normative. The consensus holds among not only legal pluralists but legal theorists too. If one examines a sample of the literature on legal theory or legal pluralism, there is little doubt that what is being discussed, even in the narrow or expanded versions of the idea of 'law' is the sphere of the 'normative'. If anything unites the disputing camps today, it is that they take for granted that what we are talking about is some aspect of the normative field or the "normative stew" of which Tamanaha (2017: 196) speaks. The main body of legal pluralists would want to claim that all societies must have some sense of normativity and therefore fulfil the minimal necessary condition for having law. Twining (2000: 231) claims, "everyone experiences normative pluralism as a fact every day of their lives." Or the normative is used together with law in such a way that no clear boundary is established (e.g. Twining 2000: 85, 231). In some cases (e.g. Merry 1988), the use of 'normative' fields and such like virtually replaces the term law, submerging law back into the "normative stew". Even objectors to the claim of law as a universal property of all societies, such as Tamanaha, argue about whether all normative phenomena are law and not vice versa. Minimally, therefore, to be 'law' a phenomenon must display normative characteristics, even if not all normative phenomena need be 'law'. This is where a hitherto underestimated insight provided by Roberts proves interesting. He says (Roberts 1979: 25-26):

> "Take first the idea of a legal rule. At the root of everyday life in any society there must necessarily be some patterns of habitual conduct followed by the members, providing a basis upon which one member will be able to predict how another is likely to behave under given circumstances and how his own actions will be received. But in some small-scale societies a normative base for these regularities is not clearly conceptualized or articulated; people simply do not always think in terms of rules and obligations. Even where they do, there is almost never found a separate class of 'legal rules', distinguished in function and organization from other types of norm in quite the way that this category is within our own society. Norms of polite behaviour, moral standards and a class of mandatory rules taken most seriously in the event of a dispute may not be distinguished in indigenous classifications. Thus, our point of departure in a clearly defined corpus of legal rules can provide little help in the study of these groups; nor can we be sure that people in another culture will think and speak in terms of 'ought' propositions at all."

Further on Roberts (1979: 170) remarks:

> "While we tend to think and speak freely about normative propositions, this is not always the case elsewhere. As early researchers found to their surprise, some peoples have difficulty in supplying an inventory of their 'laws and customs', or indeed thinking and talking in normative terms at all."

Roberts is suggesting that a normative base for action, obligations, legal rules, and 'ought' propositions may not be conceptualised at all in some, small-scale societies. He goes on to discuss the absence of other elements of what is familiarly considered proper to law in these societies and draws out (Roberts 1979: 27-28) the logical conclusion:

> "Given this lack of 'fit' between our own legal arrangements and the control mechanisms in the societies we shall be considering, and the consequent inapplicability of much of our legal theory, it seems best to avoid centring the discussion upon law altogether. Were we to insist upon doing so, the term 'law' would either have to be used excessively loosely, or else we would need to exclude from consideration control mechanisms which in many societies hold central importance."

The inference is tremendously important. Although the route taken is different, it supports the idea that "law is a thoroughly cultural construct" (Tamanaha 2001: 193, although the exact consequences of its 'construction' may differ from what Tamanaha had in mind) and "it is conceivable that there will be societies without law" (Tamanaha 2001: 201).

The proposition that there are cultures that do not have normativity is supported by the hypothesis suggested by Balagangadhara (2012: 84) that in India and China the 'ethical' domain itself is constructed differently: not on religion as it is in the West. (We part company with Roberts (2005: 14) who ends up suggesting that in these societies here is normativity and something like law.) In Asia, ethical language is not a normative language; ethical relations are factual relations; people act ethically without needing norms of ethical behaviour. In turn this hypothesis is supported in a central claim made by Balagangadhara (1994) that Asia is culture without religion. We find similar suggestions regarding the "pre-legal" ancient Greeks of whom Kelly (1992, cited in Menski 2006b: 135) says: "There is no apparent consciousness of custom as something normative." In these cases, we may or may not be talking about only the small-scale societies that Roberts had in mind.

In following the consequences of these suggestions we do not have to subscribe to Tamanaha's conventionalist approach to law. We also do not need to accept the idea that the parochialism

unwittingly extended by legal pluralists into a universal claim for all societies and cultures is only because they do not share a history of the emergence of secular government in Europe and did not engage in colonial expansion (Roberts 1998: 98). Law may well be a cultural construct, as Tamanaha suggests, but it isn't inconceivable that law may itself be tied to (Semitic) religion - in the sense of Balagangadhara's theorisation - in ways that have yet to be explored and deepened. If it is so, it would account for the decisions made by Rowan Williams and Maleiha Malik. It would be possible to see law not merely as a conventional phenomenon but one that can be theorised about. Such a theorisation does not entail a commitment to seeing law as a universal but it should be able to explain how law has emerged as a property of some but not other cultures.

The second illustration of parochialism is to do with the construction of Hindu law, which is said by Menski (2003: 591-598) to be a component of Asian laws in Britain. It is evident enough that Indians had produced the literary and practical tradition of dharmashastra (which spread beyond India). Textual elements of this tradition were taken up by the British during the early colonial period and reconstituted into what became known as the Hindu law. Suggestions are not lacking (e.g. Bhattacharya-Panda 2008; De Roover 2011) that the Hindu law thus developed bore a resemblance to an underlying template of canon law and was made despite the fact that the use to which the dharmashastric tradition was put prior to colonisation bore no relationship to the concept of law that the colonists had brought with them. Some writers (Davis 2010; Olivelle 2018) continue to view the dharmashastric tradition as theology, seeing Hinduism as a religion as the Semitic religions are, despite all the problems such a view papers over (Balagangadhara 1994). Meanwhile, in another camp, Menski (2003) acknowledges that Western distortions coloured the colonial exercises defying tradition but insists that the dharma to which the dharmashastric tradition referred is what contains the core concept of Hindu law. As "*angrezi dharma*, a form of dharma unique to British Hindus" (Menski 2003: 592), it is spread transnationally via migration, and is a part of the Asian laws in Britain. It is a cognate to the *angrezi shariat* of the Muslims. However, suggestions also abound that the Indians lack any European-like notion of law and that dharma is not the same as law (e.g. Menski 2003: 42-43, 74-75; though with certainty that law = dharma, see Davis 2010: 22). So the assertion that dharma is what the Hindu law is is question-begging and entails the contradiction "dharma is not law and yet is law". The argument has other weaknesses: "If indeed all human societies have law (Moore 1978), why should ancient Hindu societies be any different?" asks Menski (2003: 43). Well, there may be multiple reasons why one culture possesses a property that another does not and the dependence on the core credo of the legal pluralists no longer provides a firm foundation for claiming that Hindus too have law. The Hindu law problem is, from one perspective then, an instance of the larger problem the legal pluralists face in their insistence on the universality of law instantiating the kind of "jamming" that Benda-Beckman referred to.

5. Conclusion: Meaningful silence?

At various points in his work Menski (especially 2006b) points out the silence with which Western conceptions of law and their purveyors are greeted by those outside their framework, be they Chinese, Hindus or Africans. Such silences are described variously as being "meaningful", "strategic", or "significant". Since many things can be read into silence it is obviously difficult to attribute any particular property to it or to identify specific reasons to explain it. However, a notable aspect of the proposition of Asian laws in Britain is the silence with which it is greeted. Evidently, that is not so for one of its claimed components, Islamic or Muslim law in Britain, which instead appears to have received wide endorsement by both Muslims and non-Muslims, functionaries and laypeople alike, whether or not they use the term *angrezi shariat*. The other components that ostensibly compose

Asian laws in Britain aren't endorsed in anything like the same way and have mostly been ignored by both fellow academics and by members of those population groups which are claimed to display the properties that the descriptor 'law' would attribute to them. One can draw the consequences from this that Tamanaha might: because the concerned groups don't 'own' the conception of their customary practices as being legal by convention they can't be law. It wouldn't be enough for anthropologists or legal pluralists to routinely refer to their customs as legal (Tamanaha 2001: 226). However, there are more fundamental reasons why the conception of Asian laws in Britain cannot work. Legal pluralists and their opponents may agree that law is a thoroughly cultural product but they draw quite different consequences from this insight. The legal pluralists would want to maintain that law is nonetheless universal whereas their opponents say that law isn't a universal property of all cultures and societies. However, Tamanaha's opposition to the legal pluralists is limited by his unhelpful conventionalist approach to law and his arguing against the possibility of a theory of law. A theory of law is what is needed in order to enable a distinction to be made between those societies and cultures which have or don't have law. A theory would need to account for why some cultures carry an intuition of the necessity of law as a precondition for the sense of order and why others don't. Although legal pluralists are in principle open to such theorisation, it is bound to have consequences for their claim of universality: it would destroy it. Legal pluralists are already vulnerable to the charge of ethnocentrism, Eurocentrism or parochialism that they have levelled against others. If one takes up the conviction that law is to do with the normative domain, it can be shown that the sense of the normative isn't universal, and the fact that they have been promoting it as universal underscores their parochialism. If the sense of the normative isn't universal, then the claim that law is a universal cannot stand either. Although long held in abeyance, Simon Roberts' insight may well be tenable. A conception such as Hindu law can also be shown to be incoherent or merely dependent on the unsupportable claim of law's universality. This has fundamental consequences for any conception of Asian laws in Britain, which can't be supported either, except in so far as some components of the South Asian population, Muslims in particular, have law. These arguments do not exempt scholars from continuing to study the interactions of South Asians and other diasporas with the state legal systems in their countries of settlement. They merely mean that the framework of legal pluralism as currently practiced may fail to provide a viable template to do so. Its weakness has implications beyond what we think of Asian laws in Britain …

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